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No. 85-692

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

KATHRYN A. SHUBA,

Petitioner,

vs.

AUSTINTOWN BOARD OF EDUCATION,

Respondent.

On Petition for Writ of Certiorari
To the Supreme Court of Ohio

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. A FINAL JUDGMENT HAS BEEN ENTERED FOR THE ISSUES SPECIFIED IN THE PETITION FOR WRIT OF CERTIORARI THEREBY

GRANTING THIS COURT JURISDICTION OVER THESE MATTERS.

The Supreme Court of the State of Ohio dismissed the Petitioner's appeal on constitutional issues, sua sponte, thereby forclosing Petitioner's opportunity to seek redress for the violation of her equal protection and due process rights, which were the only issues described in her petition.

Respondent argues that, as a result of the Court of Appeals for the Seventh Judicial District of Ohio remanding of Petitioner's contract claim to the trial court for further determination, this court has no jurisdiction to review this alleged non-final judgment.

It has been well established that if upon remand a favorable outcome would render other issues moot, then the judgment from which a Writ of Certiorari is sought is not final within the meaning of 28 U.S.C. §1257. See generally, Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); Flynt v. Ohio, 451 U.S. 619 (1981).

It is Petitioner's contention that regardless of the ultimate outcome of the trial court's determination of Petitioner's contract claim, the equal protection and due process claims raised in the petition will not be rendered moot.

In the instant case, Petitioner alleges that the disparate treatment given to teachers assigned to the auxiliary services program deprives them

of liberty and property interests in violation of their equal protection and due process rights as guaranteed by the Fourteenth Amendment to the Constitution.

As teachers assigned to the auxiliary services program, they were systematically denied equal access to evaluation, performance consultation, job transfers and other career advancement opportunities. They could be terminated at the whim of the administration, without regards to qualification, in a fashion grossly disparate from other teachers in Respondent's teaching force. Hence, as to the issues presented in Petitioner's Writ of Certiorari, a final judgment exists, from which Petitioner may only vindicate her rights before this court and at this time.

II. PETITIONER RAISED ALL ISSUES CONTAINED IN HER PETITION FOR A WRIT OF CERTIORARI IN THE COURTS BELOW AND THEY ARE PROPERLY BEFORE THIS COURT.

Respondent alleges that petitioner's due process/liberty interest, (Question 2 in the Petition), was not presented in the courts below and is not properly before this Court. Respondent made this allegation in each of the appellate courts below specifically because petitioner continually asserted a violation of her liberty interest resulting in the denial of her due process rights.

Specifically, Proposition of Law No. 4, raised in Petitioner's Memorandum in

Support of Jurisdiction to the Supreme Court of Ohio states:

> A teacher who holds a professional certificate has a property and liberty interest protected by the Ohio Constitution and the Fourteenth Amendment of the United States Constitution. (Petitioner's Appendix 60).

In Petitoner's brief before the Ohio Court of Appeals she cited as assignment of Error No. 3:

> The court erred by granting defendant's motions for summary judgments in regards to Kathryn Shuba's deprivation of equal protection and due process causes of action. (Petitioner's Appendix 61, 62).

Both propositions were issued in argument to indicate a deprivation of her due process rights occurred. Petitioner merely refined her "Questions Presented" so as to clarify her position in response to the adverse judgments below. In essence, Petitioner merely divided her

due process analysis to deal separately with the liberty interest in Question No. 2 and the property interest in Question No. 3. In this Petition, Petitioner augmented her due process liberty interest question to include a brief statement of the factual basis of the claim. To date, Petitioner has been denied all opportunity to proffer evidence in suport of her position. Despite the mere rewording, the question is predicated on the assignments of error developed below, and is properly before this Court.

III. PETITIONER'S DUE PROCESS CLAIMS WERE NOT PROPERLY RESOLVED UNDER STATE LAW AND THIS COURT MAY REVIEW THE DECISIONS BELOW TO DETERMINE IF THEY ARE IN

ACCORD WITH FEDERAL

CONSTITUTIONAL STANDARDS.

Petitoner has yet to be granted a forum in which to present her argument in support of her contention that she had acquired a property interest in continued employment with the Respondent. Respondent, in its Brief in Opposition, indicates that pursuant to State law, one who is employed under a limited teaching contract may be terminated without cause, pursuant to the provisions of Ohio Revised Code §3319.11 (providing essentially that to effecuate such a termination, only appropriate and timely notice be given). Petitioner has no argument with Respondent's argument, to the extent analyzed by the Respondent. However, Respondent's analysis is of

limited application to the facts and issues contained herein.

It is, and always has been Petitioner's contention that she had a property interest in continued employment for two reasons: first, at the time of Petitoner's termination she held a professional teaching certificate, which, pursuant to Ohio law entitled her to a continuing (tenured) contract and an expectancy of retention; and secondly, but for the disparate treatment accorded teachers assigned to the auxiliary services program of the Respondent, Petitioner would have held a professional teaching certificate prior to her having signed the contract for her final year of teaching. Pursuant to Ohio Statutory and case law, one who is entitled to a continuing contract is deemed to have

been granted tenure, despite the fact that the teacher signed a non-tenured contract. See generally, Ohio Revised Code §3319.11; Struthers City School Board of Educ. v. Struthers Educ. Ass'n, 6 Ohio St. 3d 308 (1983); Tracy v. Otsego Board of Educ., 6 Ohio St. 3d 305 (1983); Dayton Teachers Ass'n v. Dayton Board of Educ., 41 Ohio St. 2d 127 (1975).

To date, Petitioner has not been given an opportunity to proffer evidence to prove her entitlement to tenure. It is Petitoner's contention, that the courts below have misinterpreted the language of the statues involved, and hence have deprived her of her livelihood without the requisite procedural safeguards.

IV. PETITIONER'S EQUAL PROTECTION CLAIMS ARE OF GREAT IMPORTANCE IN THAT THE VIOLATION OF HER RIGHTS HAS DEPRIVED HER OF THE ABILITY TO EARN A LIVING.

Respondent argued that Petitioner did not have a fundamental right to continued employment and/or tenure, and that hence, "heightened scrutiny" is inappropriate.

Petitioner did not claim that she had a fundamental right at stake or that any type of "heightened analysis" should be used. Indeed, in the Petition for a Writ of Certiorari, Petitioner argued that "there is no rational basis" for the treatment accorded a teacher assigned to the auxiliary services program.

Petitioner is seeking review of the unfair, disparate treatment she received as a teacher in the auxiliary servies program. While this is not a class action, Petitioner believes that all teachers who serve in these programs are adversly affected. This program was administered in such a manner as to be unfair to any teacher.

CONCLUSION

Throughout the past five years of litigation, Plaintiff's arguments have been misconstrued and misunderstood as to Federal Constitutional principles. She has been denied the opportunity to present evidence in defense of her career as a teacher and her professional reputation. Throughout Petitioner's

career, she was arbitrarily classified as an auxiliary services teacher and not given the same opportunities for professional growth and enhancement as were regular teachers.

During her final year of teaching, the board deliberately concealed derogatory information and prevented her from enforcing her liberty interest through appropriate procedural safeguards. This ultimately resulted in ending her teaching career and she has been unable to teach and earn a living since 1979.

Petitioner continuously argued that she had a liberty interest and had acquired a property interest in continued employment, but was consistently denied the opportunity to present her case.

This matter is of great importance since it affects the rights of all

teachers who are so arbitrarily classified and subject to the capricious rulings of the school administrators. These auxiliary service teachers are denied the mechanisms and safeguards accorded to regular public school teachers.

Petitioner respectfully requests this Court grant a Writ of Certiorari to the Supreme Court of Ohio.

Respectfully submitted,

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